UNITED
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AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 659

Case No. 697: AL-ATRAQCHI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, First Vice-President, presiding; Mr. Luis de Posadas Montero, Second Vice-President; Mr. Mikuin Leliel Balanda;

Whereas at the request of Mohammed Ali Al-Atraqchi, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 28 October 1992 the time-limit for the filing of an application to the Tribunal;

Whereas, on 8 October 1992, the Applicant filed an application requesting the Tribunal, inter alia:

"...to find that:

(a) The Applicant's candidacy to [the] post of Special Assistant to the Under-Secretary-General for Political and Security Council Affairs [PSCA] was not given the 'fullest regard nor adequate consideration in a reasonable manner...';

(b) The decision not to advertise the subject post constitutes a deliberate violation of relevant Staff Rules and Regulations, [and] General Assembly resolution No. 33/143...

...

(d) [The appointment violated Personnel Directive PD/2/88, and]

(e) [General Assembly resolution 35/210 of 17 December 1990]

(f) [As well as] the principle that no post is reserved to any nationality...

(g) [That] while the Panel on Discrimination and Other Grievances, in its memorandum dated 1 July 1991 to ... [the] Assistant Secretary-General, OHRM [Office of Human Resources Management], recommended that 'the Administration should investigate and properly deal with the very subtle form of discrimination which seems to have prevailed in the [relevant] Department', this has not been done;

...

and, accordingly to order that:

(a) The contested decision be annulled;

(b) The subject post be advertised;

(c) The Applicant's candidature to a D-1 post be considered fully and fairly in accordance with the Staff Rules and Regulations and in conformity with due process;

(d) An end be put to the ongoing discrimination against the Applicant by the former Department of PSCA;

(e) That the Applicant be paid an amount equivalent to two years net salary in compensation for the unending series of violations of his right to be considered for a promotion and the clear hostility of PSCA towards him."

Whereas the Respondent filed his answer on 11 December 1992;

Whereas on 12 March 1993, the Applicant submitted an additional statement;

Whereas the Applicant filed written observations on 19 March 1993;

Whereas, on 23 June and 1 July 1994, the Tribunal put questions to the Respondent, to which he provided answers on 28 June, 1 and 7 July 1994;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 7 October 1967, under a probationary appointment at the P-2 level, as an Associate Statistician, with the Statistical Office of the Department of Economic and Social Affairs. On 1 October 1969, his

appointment was converted to a permanent appointment, and on 1 June 1970, he was promoted to the P-3 level as a Statistician. On 1 September 1973, the Applicant was transferred to the Council and Committee Services Section, Security Council and Political Committees Division, Department of Political and Security Council Affairs (PSCA), as an Economic Affairs Officer. On 1 April 1974, he was promoted to the P-4 level and on 1 July 1979, to the P-5 level, as a Senior Political Affairs Officer. The Applicant separated from the service of the United Nations on 31 July 1993, having reached the mandatory retirement age.

On 5 September 1991, Mr. Leonid Malyev, a national of the former USSR, who encumbered the D-1 level post of Deputy Director of the Security Council and Political Committees Division and Chief of the Council and Committee Services Section, died. In instruction No 730 of PSCA, dated 21 October 1991, the Under-Secretary-General announced that Mr. Evgeniy Gorkovskiy, a staff member at the D-1 level and a national of the former USSR, who had been serving as Special Assistant to the Under-Secretary-General for PSCA, had been appointed Deputy Director of the Security Council and Political Committees Division and Chief of the Council and Committee Services Section, with effect from 18 October 1991.

On 30 October 1991, Mr. Rollan Dzhikiya, a Senior Counsellor at the Permanent Mission of the former USSR, was appointed Special Assistant to the Under-Secretary-General of the Department of PSCA, on a fixed-term appointment of four months, ending on 29 February 1992, as a replacement for Mr. Evgeniy Gorkovskiy.

On 25 November 1991, the Applicant requested the Secretary-General to review the administrative decision to appoint Mr. Rollan Dzhikiya to the post of Special Assistant to the Under-Secretary-General. He stated inter alia that the appointment had been made "without any advertisement of the post, as required by resolution 33/143, part 1, paragraph 1(a) of 20 December 1978" and was contrary to Personnel Directive PD/2/88 concerning the contractual status of Special Assistants. Having received no reply from the Secretary-General, on 27 January 1992, the Applicant lodged an appeal with the

Joint Appeals Board (JAB). The JAB adopted its report on 28 February 1992. Its conclusions and recommendations read, in part, as follows:

> "Conclusions and recommendations
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> 26. In view of the Panel's unanimous finding that the Appellant's statutory right to consideration had been violated, it concluded that compensation should be awarded.
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> ...
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> 28. The Panel concluded unanimously that the Appellant should be considered fully and fairly for vacancies in future and that he should be compensated in the amount of $1,000 for the damage suffered as a result of the Administration's denial of his right to consideration.
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> 29. Finally, the Panel welcomes the Respondent's assurances that the post will be advertised once it becomes vacant after 29 February 1992. ..."

On 11 May 1992, the Assistant Secretary-General for Human Resources Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

> "The Secretary-General has re-examined your case in the light of the Board's report. Although he does not fully share the Board's reasoning, he has decided, considering that the procedure established for the appointment of Special Assistants had not been followed, to accept the Board's unanimous recommendation that you should be considered fully and fairly for vacancies in future and that you should be compensated in the amount of $1,000."

On 8 October 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent's failure to advertise the post of Special Assistant to the Under-Secretary-General for PSCA and the temporary filling of that post, for approximately four months, by an external candidate, violated the Applicant's rights.

2. The Respondent's failure to investigate the Applicant's allegations of discrimination against him, in the Department of PSCA, violated his rights.

Whereas the Respondent's principal contentions are:

1. Heads of Departments have the authority to decide not to fill vacant posts.

2. The Applicant's allegations of discrimination are in the course of investigation. Insofar as the decision under appeal is concerned, there is no credible evidence that the contested decision was improperly motivated.

The Tribunal, having deliberated from 22 June to 22 July 1994, now pronounces the following judgement:

I. The post of Special Assistant to the Under-Secretary-General for PSCA became vacant as a consequence of the lateral transfer of its incumbent to the post of Deputy Director of the Security Council and Political Committees Division and Chief of the Council and Committee Services Section. The post of Special Assistant to the Under-Secretary-General for PSCA was filled by external recruitment of a citizen of the former USSR, for a period of four months. The previous incumbent of this post was also a national of the former USSR. The Applicant claimed that the post of Special Assistant to the Under-Secretary-General should have been advertised, that his candidacy should have been considered, that the appointment of an outside candidate from the former USSR showed that improper preference for the post was being accorded to citizens of that country, and that the appointment of an outside candidate violated the provisions of PD/2/88, paragraph 2 which provides that "Special Assistants will be selected from among staff members."

II. The case was duly considered by the JAB which found that compensation should be awarded in the amount of US$1,000.00. The

Secretary-General accepted the proposed recommendation in view of the fact that "the procedure established for the appointment of Special Assistants had not been followed." The Applicant was not satisfied with the amount granted as compensation, requesting that the contested decision be rescinded. He appealed to the Tribunal, requesting that the post be announced and his candidacy to a D-1 post be considered fully and fairly. He claimed to be a victim of discrimination.

III. The Applicant's claim is virtually identical to one of the claims asserted by the applicant in Judgement No. 657, Araim, (1994) rendered by the Tribunal today. For the reasons set forth in that judgement with respect to that claim, which are reproduced below, the Tribunal finds that the responsibility of the Organization is engaged:

> "III. The Applicant's specific complaints in the present case are (1) that when Mr. Malyev (a citizen of the former USSR), the incumbent of the D-1 post of Chief of Council and Committee Services Section died, the Respondent denied the Applicant an opportunity to be considered for the vacant post by filling it through the lateral transfer of another Soviet staff member who was then serving as Special Assistant to the Under-Secretary-General, Department of Political and Security Council Affairs, and (2) that the Respondent, by filling through external recruitment the Special Assistant post thus vacated, denied the Applicant an opportunity to be considered for it.
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> The Tribunal notes that although the claims relate to two posts, in reality only one vacancy might have been available to be filled by the Applicant. If the Deputy Director post had not been filled by lateral transfer of the Special Assistant, the Special Assistant post would not have become vacant. It was only because of the lateral transfer that the Special Assistant post was open.
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> IV. The Respondent claims that under the prevailing Vacancy Management System, the lateral transfer of a staff member at the D-1 level was within the discretion of the Under-Secretary-General in charge of the department. The Tribunal does not question this right, which is provided for in administrative instruction ST/AI/338. The Applicant, however, was not at the D-1 level. He was at the P-5 level and therefore was not eligible for a lateral transfer to the

D-1 post. As it was not contemplated, at that time, that the D-1 Deputy Director post was to be, in the circumstances, filled by a promotion, the Tribunal does not consider that the Applicant has standing to challenge the lateral transfer, and the Tribunal need not consider the merits of this issue further.

V. The Tribunal notes further that the Special Assistant vacancy, resulting from the lateral transfer, was temporarily filled for a brief four-month period by a citizen of the former USSR, who was then a member of the Permanent Mission of the USSR to the United Nations. Although subsequently, the latter post was redesignated and filled by staff members of other nationalities, the Tribunal finds, from the absence of any substantial reason for external recruitment and a pattern of filling certain posts in the department, that the Respondent had decided in advance to give priority consideration to a Soviet citizen to the exclusion of others. The Tribunal was faced with a somewhat similar situation in Judgement No. 310, Estabial (1983) and held that this constituted unfair treatment in that the Applicant did not receive the consideration to which he was entitled for the vacancy.

VI. With respect to the filling of the vacancy of the Special Assistant post, not only is the Tribunal's jurisprudence in Estabial applicable for the reasons indicated above, but the Applicant was also entitled to be considered for the post under PD/2/88, paragraph 2, which provides that 'Special Assistants will be selected from among staff members', not by external recruitment. The Tribunal finds, as noted above, that the filling of the Special Assistant post by an external candidate, who was a Soviet citizen, stemmed predominantly from a determination to accord preferential treatment to a Soviet citizen, which is in conflict with the Tribunal's jurisprudence in Estabial.

VII. The only explanation given was that the four-month period 'coincides with the current ... term of all Under-Secretaries-General, including myself: ... the appointment of a new Secretary-General (expected in January 1992) may give rise to certain changes in his cabinet of senior officials. In the light of this probability, I considered it appropriate that the selection of a candidate for the post should be postponed.' This explanation, although understandable, is not acceptable as it does not state why this temporary appointment had to go to a citizen of the former USSR. In addition, as noted above, the failure to advertise the post and fill it, even temporarily, with a staff member was in violation of Personnel Directive PD/2/88, paragraph 2.

> VIII. The Tribunal holds, therefore, that the Applicant was wrongly denied the opportunity to be considered for the D-1 post of Special Assistant, and that the responsibility of the Organization is thus engaged. The Tribunal finds no merit in the Respondent's contention, in a parallel case, that Personnel Directive PD/2/88 is inapplicable to short term temporary appointments. The unambiguous language of the provision contains no such qualification.
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> ...
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> X. The Tribunal concludes that in the procedure and the process followed in this case, the interests of the Applicant were not fully protected and he is therefore entitled to some compensation. However, the Tribunal also considers that, in the circumstances of this case, which, as noted above, actually involved one vacancy, there was, without doubt, a possibility that the number of D-1 posts would be reduced in the reorganized department and, accordingly, the chances of the Applicant to obtain a promotion would be reduced, even if he were found to be qualified for such an advancement. Also, as a practical matter, the Tribunal realizes that there is some justification for temporarily filling a post for four months without any vacancy announcement. ..."

IV. As far as the compensation granted to the Applicant is concerned, the Tribunal notes that the Secretary-General accepted the JAB recommendation, solely on the ground that PD/2/88 had not been observed. In the Tribunal's view, the Applicant is entitled to compensation not only on this ground but also because of the improper selection of the person who was temporarily appointed to the post, which caused further injury to the Applicant. For the foregoing reasons, the Tribunal fixes the compensation to be paid to the Applicant at US$2,000.00, in addition to the US$1,000.00 recommended by the JAB.

V. With respect to the alleged failure of the Administration to conduct an investigation of claims of discrimination asserted by the Applicant, the Tribunal notes a communication dated 1 January 1992, from the Applicant to the Director of the Office of the Under-Secretary-General for Administration and Management in which the Applicant declined to participate in a proposed investigation unless it was conducted in a manner specified by him. Hence, this

unwillingness of the Applicant to participate was a significant factor in nullifying the proposed investigation. His claim with respect to this matter is lacking in merit.

VI. In view of the foregoing, the Tribunal orders the Respondent to pay the Applicant US$2,000.00.

VII. All other pleas are rejected.

(Signatures)

Jerome Ackerman
First Vice-President, presiding

Luis de POSADAS MONTERO
Second Vice-President

Mikuin Leliel BALANDA
Member

Geneva, 22 July 1994

R. Maria VICIEN MILBURN
Executive Secretary